



# **Progressing Kinship Care through Law and Human Rights**

## **Kinship Counts! Project, Kinship Carers Liverpool**

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## BRIEFING: Progressing Kinship Care through Law and Human Rights

April 2019

Kinship Carers Liverpool

Kinship Care Liverpool was awarded one of only 10 national grants from the Baring Foundation's **Strengthening the Voluntary Sector Programme** in 2017. This national programme seeks to embed the law and human rights-based approaches as tools of social change in the broader voluntary sector. Nationally, its project-based funding aims to:

- train and support frontline organisations in using the law and human rights-based approaches;
- encourage the use of these tools in organisations with no history of taking legal action or advocating for rights; and
- create the link between frontline activity and policy change using these approaches.

Through a series of action learning sets Kinship Carers Liverpool worked collaboratively with stakeholders in the city to further develop joint working arrangements and the pathways of support for kinship families locally. Participants included senior social workers from LCC Children's Services, LCC Children's Service Lead Officer and family law solicitors.

This briefing paper summarises the project outcomes around the law and human rights elements of the project. Further information can be found at [www.kinshipcarersliverpool.co.uk](http://www.kinshipcarersliverpool.co.uk)

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Commissioned by Kinship Carers Liverpool

### Summary

- In the Kinship Counts! Programme **law and human rights** were relied upon to help kinship families.
- Kinship families take on the care of the child of a family member or a friend. They often **face difficulties** accessing financial, legal and other support.
- A human rights-based approach is important for many reasons. One reason is that it is based on a notion of basic **entitlements** rather than charity.
- In this project, **law and human rights were used** in discussions with local authorities, kinship care organisations and others; in information briefings; and in work with lawyers who may provide legal advice and representation to kinship families.
- This encouraged advocates for kin families, local authorities and others involved in the Kinship Counts! Programme to **use the human rights framework** when working with and for kinship families, one which is based on:
  1. *international human rights law standards*
  2. *a notion of basic entitlements rather than charity, and*
  3. *kin families, local authorities and others working together to solve problems; agreeing on actions and changes to improve outcomes and the wellbeing of families.*

**This briefing** highlights the background, process and initial outcomes in this project from the perspective of the human rights-based approach involved.

- In outlining this it is hoped that other groups, local authorities and central government will find it useful to adopt the human rights-based approach to kinship care and other issues.

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## 1. Introduction

This briefing is part of the **Kinship Counts! Programme** (funded by the Baring Foundation 2017-18) which identified ways to achieve improved outcomes for kin families in Liverpool. Part of this project involved engaging **law and human rights** for kin families. The project identified ways in which law and human rights can be explicitly embedded in the work of statutory bodies and others working with kin families.

Kinship families, including kin children, face very **significant hurdles** to well-being. The laws around the status of carers can be very complex. Many **financial entitlements** will depend on whether a child is a 'looked after child', that is, in the care of the state. Some children are in kinship care under other orders such as 'special guardianship' orders. Most children being cared for by extended family and friends do not have this status but instead an '**informal**' arrangement whereby the state is not involved. Their carers therefore often have little if any financial or other support, though they are performing significant care duties, often at enormous cost to themselves both financially and health-wise. This can lead to the **breakdown** of the arrangement and children entering 'stranger' foster care. Frequently kinship carers (and potential kinship carers) do not **understand their legal status** and relevant options such as solidifying their legal relationship with the child, and they often have no right or access to **legal advice or representation**. Children's best interests can be harmed where such assistance is not provided. There are, therefore, many rights relevant to the experiences of kinship families, such as the right to family life, the right to information, the right to a fair trial, and specific children's rights.

In this briefing, the relevance of the human rights-based approach to kinship care will be outlined. Section 2 considers the human rights-based approach generally. Section 3 outlines the approach we took. Section 4 reflects on that approach and relevant outcomes.

## 2. Achieving a more human rights-based approach to kinship care

Human rights are derived from **laws** in the UK and international treaties, as well as being an **approach** or way of thinking. A human rights-based approach is important and useful because it is based on:

- international human rights law standards
- a notion of basic entitlements rather than charity, and
- kinship families, local authorities and others working together to solve problems; agreeing on actions and changes to improve outcomes and the wellbeing of families.

### What are human rights?

Human rights are **basic entitlements** that we have because we are human, such as the right to life and the right to an adequate standard of living. There are many **international law treaties** which enshrine

legal human rights standards – such as the UN Convention on the Rights of the Child – and there are some **international courts** which enforce them. They often **mirror laws at domestic level**.

**Authorities 'on the ground'** in a particular country – authorities such as police, social workers and courts – are crucial for ensuring respect for human rights.

### Does everyone agree on what human rights are?

Rights can be contested. There are sometimes **different arguments** about what a right actually entails. There are also sometimes **negative perceptions** of human rights, including in the press. It is sometimes not well understood that human rights have been developed to protect individuals where the state has a lot of power. Rights apply to everyone, including prisoners and others who may be unpopular. It is sometimes hard to get agreement around rights therefore, and it can be hard to understand what rights we have.

### Can you bring human rights to UK courts?

States which have signed up to international human rights treaties are obliged to **abide by them**. In many states the treaties automatically become law. In the UK action must be taken for the treaties to become law – this has only happened with the **European Convention on Human Rights** – a list of rights which European countries have agreed to abide by.

Treaties which have *not* been brought into law (like the UN Convention on the Rights of the Child) may have **persuasive effect** in UK courts. This means that it may not be possible to **litigate** on the basis of the rights in these treaties in UK courts but courts will **take them into account**. If the right is already in the laws of the UK, such as fair trial rights, then they can of course be litigated.

As the ECHR has been given effect in UK law through the Human Rights Act 1998, it is possible to **bring a challenge** to laws in the UK on the basis that they do not conform to this instrument. The right to family life, the right to a fair trial, the right to an adequate standard of living, and the right to freedom from discrimination are all contained in the ECHR.

The key points about a human rights-based approach are that it is about **rights rather than charity**; there are ‘duty bearers’ who must observe rights; and those affected by laws and policies should be involved in the work and in holding duty-bearers to **account**. While there is no universal agreement as to a **definition** of a human rights-based approach, United Nations agencies have agreed on essential attributes:<sup>1</sup>

<sup>1</sup> See for example <http://www.unfpa.org/human-rights-based-approach>.

1. As law, policies and programmes are created, the main aim should be to fulfil **human rights**.
2. Principles from **international human rights treaties** should guide the approach.
3. **Rights-holders** and their entitlements and **corresponding duty-bearers** and their obligations must be identified. The **capacities of rights-holders** to make their claims and of duty-bearers to meet their obligations should be strengthened.

In advance of our workshops, we considered examples where a human rights-based approach was successful in advocating for kin families and other groups. The following are some of the examples we considered. Some do not directly relate to kinship care. The use of the rights framework to help kinship families is relatively new, so examples are hard to find.

## The right to an adequate standard of living

Many kinship carers **struggle financially** where they opt to care for kin children. For some families, the financial burden is **too onerous** to take on caring responsibilities. This is related to ‘the right to an adequate standard of living’ – a right which is included in many international human rights treaties such as in the European Convention on Human Rights Article 1 of Protocol 1 (A1P1) (it is referred to as the right to peaceful enjoyment of property and possessions in that instrument). This right was recently relied upon in Scotland to progress support for kinship families, albeit families caring for children with ‘looked after’ status:<sup>2</sup>

<sup>2</sup> See <https://www.equalityhumanrights.com/en/legal-work-scotland/legal-work-scotland/scottish-legal-articles/human-rights-children-kinship-care>.

## A human rights-based approach to advocating for kin families in Scotland

In Scotland, kinship carers (with children of 'looked after' status) were previously entitled to **less than 'stranger' foster carers** in some areas. The Equality and Human Rights Commission in Scotland sought in 2013 to address the low level of financial support provided to kinship families, identifying how it was happening (e.g. inequalities in benefit payment) and highlighting potential contravention of the **European Convention on Human Rights**.

They put this information to the Scottish Government, explaining that they were minded to use their legal powers to raise **judicial review** proceedings against the councils, challenging the lawfulness of their arrangements for providing financial support to looked after children in kinship care. They relied (amongst other things) on Article 1 of Protocol 1 of the ECHR. To address these concerns, the Scottish Government **now provides an additional £10.1 million** annually to councils to ensure kinship allowances are at the same level as foster allowances.

## The right to private and family life

The right to private and family life is a right enjoyed under Article 8 of the European Convention on Human Rights. Children and parents have the right to be together unless the state determines that this is not possible (for example where a child is not safe). States must also determine whether



children can be cared for by the extended family. Article 8 was relied upon in the following example in a healthcare setting:

### Using the Right to Private and Family Life to Improve Health Care Standards

MacMillan Cancer facilitated a project for cancer patients<sup>3</sup> focusing on '**moments that matter**', building relationships between professionals, patients and carers. The project involved first improving understanding of human rights among the project participants, and using international human rights standards to frame discussions with over **300 patients, staff and managers** about the chief things they considered to be going wrong and to explore how they could be put right. For example, in respect of **the right to private and family life** patients emphasised the importance of staff addressing them by name. Through this process a series of **behavioural standards** were developed, by patients, carers and staff, for the Cancer Care Pathway. The 'values based standard' is now recommended as best practice in the National Cancer Reform Strategy and has been implemented by numerous health trusts.

### Access to general information and to legal assistance as a human right

If a person has a legal problem and they are not able to pay for legal advice and/or representation themselves, they may be entitled to **legal aid**. Due to the Legal Aid, Sentencing and Punishment of Offenders Act 2012, however, many areas of law have been **removed from the scope** of legal aid recently. This has greatly affected vulnerable people.

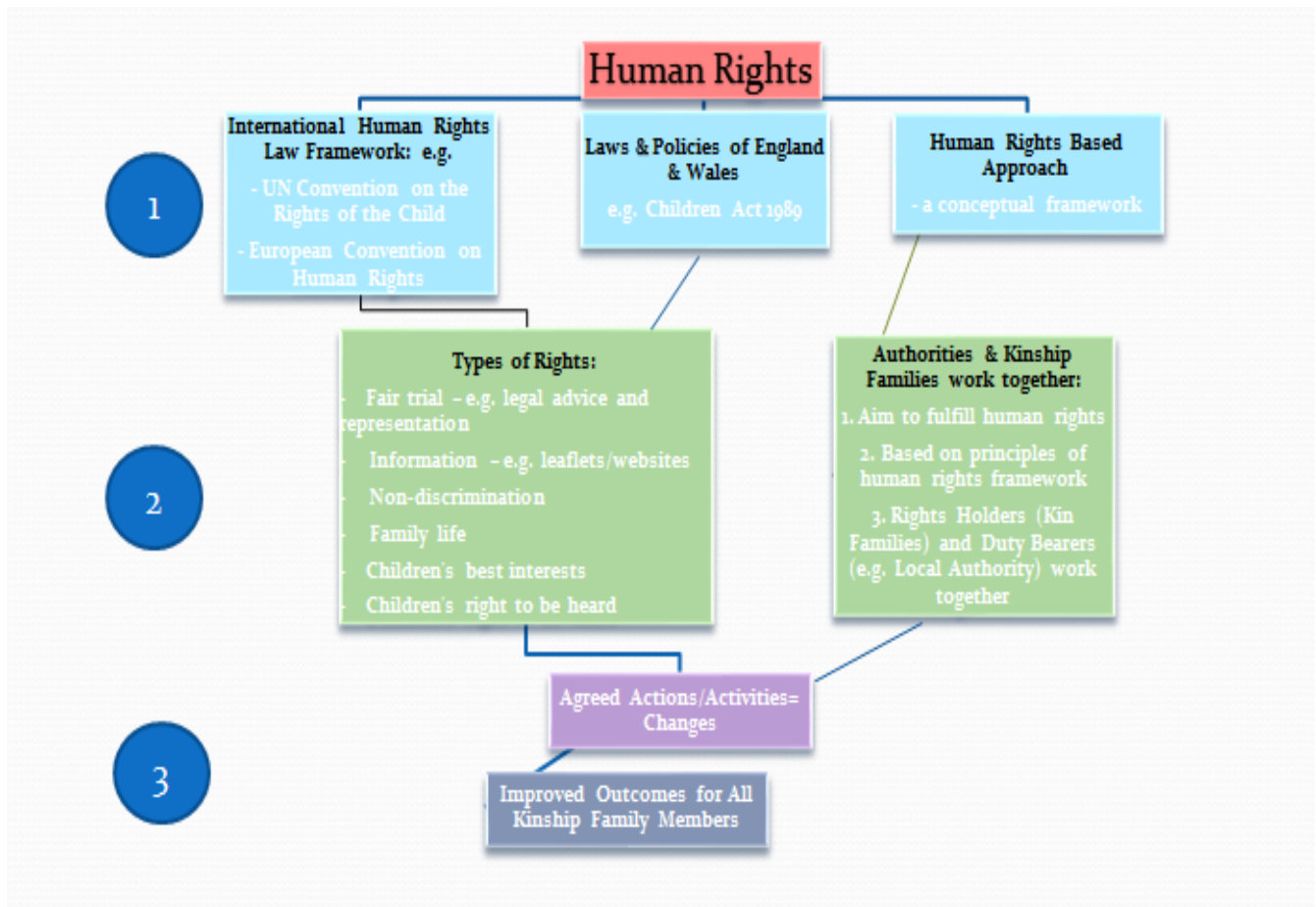
Where an individual cannot afford legal representation, this can undermine their **right to a fair trial**. This is protected under Article 6 of the Human Rights Act. The European Court of Human Rights has stated that the right of access to a court must be **meaningful and practical**, not just theoretical. That is, it must work in practice and not just be a right 'on paper'.

Yet the right to legal assistance is now **very limited**. Some grandparents will not be able to access it where kinship care becomes a possibility, for example, as their earnings may not be low enough. Another problem is that the family law cases in which one is now entitled to legal aid is generally **limited to parents themselves**, and even then only parents who are dealing with social services or where there is domestic violence.

The area of general information and access to legal assistance is a **key area** for kinship families. It is likely something which, if improved, would have knock-on benefits in other areas such as mental health and more speedy resolution of cases. It is one which requires more detailed consideration in relation to kinship care by local authorities and others.

<sup>3</sup> See [https://www.macmillan.org.uk/\\_images/macmillanvaluesbasedstandard\\_tcm9-270945.pdf](https://www.macmillan.org.uk/_images/macmillanvaluesbasedstandard_tcm9-270945.pdf)





**Table 1. Kinship care: The process of taking a human rights-based approach (Daly, 2019)**

### 3.1 Where laws and rights come from

The model in Table 1 highlights that human rights can come in a number of forms. Human rights can be in legal form, or they can be achieved through ways of thinking.

Human rights can be contained in **laws**, for example the laws of:

- England and Wales, such as the Children Act 1989 which outlines various provisions concerning children, including some of the duties of local authorities.
- The European Convention on Human Rights (ECHR), which is given effect in the laws of England and Wales through the Human Rights Act.
- The UN treaties such as the UN Convention on the Rights of the Child (CRC), which is not given effect but is persuasive in England and Wales and is sometimes mentioned by judges.

There is also a **human rights-based approach** which is not only arising from law, but from a conceptual framework which uses human rights to guide processes and outcomes.

We used our consultation session with kinship carers and our workshops with stakeholders to outline human rights and a human rights-based approach to kinship care. We followed-up these sessions with meetings with key authorities, similarly bringing this knowledge to our discussions.

### 3.2 Examples of rights relevant to kin families and outline of a human rights-based approach

Taking a human rights-based approach involves working with relevant legal standards. It also requires the adoption of human rights as a frame of reference for the work being done.

#### Laws

Actions and outcomes should be based on relevant human rights standards. Some are to be found in national law for example the Children Act (England and Wales) 1989, which emphasises that children's welfare must be the primary consideration in their upbringing, and outlines duties of local authorities where a child is in need.

Human rights are also to be found in international human rights instruments. As noted above, the UK has signed up to the European Convention on Human Rights which enshrines the right to a fair trial which in some circumstances will mean the right to legal advice and representation.

The UN Convention on the Rights of the Child (CRC) is another international human rights instrument which has been signed and ratified by almost every state in the world. It enshrines a list of basic rights for children.

**The four guiding principles (also referred to as 'general principles') of the CRC are:**

- the right of children to be heard in all matters affecting them (Article 12);
- the right to freedom from discrimination (Article 2);
- the principle of the best interest of the child (Article 3); and
- the right to life, survival and development (Article 6).

The most prominent right is probably Article 3(1) of the UN Convention on the Rights of the Child (CRC) which states:

*In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the **best interests of the child shall be a primary consideration.***

Although the CRC has not been incorporated into domestic law in the UK, it is used as a **basis for guidance** on implementation of domestic law principles (and understanding of the European Convention on Human Rights).<sup>5</sup> The best interest principle mirrors the Children Act 1989 principle that the welfare of the child is a paramount consideration in matters concerning the upbringing of the child. Therefore authorities **must consider the CRC** when they are working on kinship care issues.

Another vital point is that children have the **right to be heard** in all matters affecting them (Article 12 CRC). Children will increasingly have wishes about their living arrangements as they get older. They should be heard and considered by authorities and children **may need representatives** in legal proceedings. CAFCASS often facilitates this. The extent to which children are sufficiently heard and represented, however, can often be lacking, as can the extent to which their wishes influence decision-making about them by courts and others (Daly, 2018).<sup>6</sup>

We proceeded in our work by bringing knowledge about individual laws and standards to kinship carers and to the workshops with stakeholders. This involved highlighting particular standards, such as the right of children to be heard, as well as relevant case law, for example involving fair trial rights.

### **Approaches**

A human rights-based approach is also a **way of thinking**. It requires the adoption of human rights as a **frame of reference** for the work being done including through empowering people to know their rights and increasing the accountability of relevant authorities. As noted above, there is broad agreement that it involves the following elements:

<sup>5</sup> *R (Howard League for Penal Reform) v Secretary of State for the Home Department and Department of Health* [2002].

<sup>6</sup> Aoife Daly, *Children, Autonomy and the Courts: Beyond the Right to be Heard* (Brill/Nijhoff, 2018).

1. *Authorities (e.g. local authorities) and organisations work to implement human rights-based standards.*
2. *Authorities and organisations have human rights-based standards embedded in their work.*
3. *Rights holders (kinship carers and children) and duty bearers (e.g. local authorities and other organisations) work together.*

Kinship Carers Liverpool consulted kinship families on their needs and experiences, adopted a human rights-based understanding of kinship care and brought this to our work with authorities in the Kinship Counts! Programme. Kin families were represented through Kinship Care Liverpool throughout the process. In this way human rights-based standards were embedded in the Programme. The various components of this work will now be considered.

#### *Kinship care: Components of a human rights-based approach*



**Table 2. Kinship care: Components of a human rights-based approach (Daly, 2019)**

In Liverpool, our human rights-based approach focused on the components outlined in Table 2. We adopted five steps in our approach to kinship care:

## Consultation with Kin Families

A key part of the human rights based approach taken in the Kinship Counts! Programme was to represent the views and interests of kin families themselves. Kinship Care Liverpool has been providing information and support to kin families since the 1990s. Their staff and board are comprised of those with personal experience of kinship care. Kinship Care Liverpool is therefore well-placed to represent kin families. A number of workshop meetings were held with kin families to consult them specifically on their needs and experiences in advance of the initiation of the Kinship Counts! Programme workshops. A number of themes were identified which kin families describe as key to their wellbeing, for example:

- understanding human rights;
- special guardianship and kinship care;
- private/informal arrangements and kinship care;
- legal advice and representation;
- children in kinship care and their education;
- information for kin families.

## Identification of Rights Issues

In advance of the Kinship Counts! Programme workshops, efforts were made to identify the specific rights issues and/or legal issues arising from the themes raised by kin families. We drew upon the international human rights instruments, national law and literature outlining human rights-based approaches.

We then worked to identify achievable rights goals. Those goals included:

1. Bringing greater information to kinship carers (Article 6 ECHR);
2. Bringing together those who provide legal advice and representation to better provide for kinship carers (Article 6 ECHR);
3. Bringing the views of kinship carers and children to local authorities (Article 12 CRC);
4. Working to ensure that kinship carers do not experience undue discrimination compared to other families (Article 14 ECHR);
5. Bringing greater knowledge of law and human rights to families, local authorities and others.
6. Working to ensure that kinship families are supported to stay together (Article 8 ECHR) where this is in the best interest of the child (Article 3 CRC), including through families getting the resources that they need (Article 1 of Protocol 1 ECHR);









forged links between professionals such as lawyers working in the area of child protection and kinship care advocates – this was particularly crucial in an area where access to legal advice is so important yet often so difficult to achieve. The emphasis on the right to information also brought greater awareness that kin families often do not have enough accurate information when making decisions about care of kin children. The emphasis on non-discrimination in the project led to work around highlighting the specific needs and experiences of kinship care families. It was felt that there was insufficient knowledge amongst professionals about kinship care and there has been much ground made in improving this through for example “Early Help Hubs” (where social work practitioners identify a child’s need for multi-agency support) being made more aware of kinship care issues.

Taking a human rights-based approach is not without its challenges, however. It is difficult to successfully argue for additional resources for kinship care families, as authorities can have both limitations in what is available and much discretion as to how budgets are allocated. The project has been conducted at a time when severe budget cuts imposed nationally have taken a massive toll on local authority work. Very often resource allocation is at the discretion of local authorities. At the time of writing, however, it has been announced that there will be an extra £7.7 million invested in social care in Liverpool as part of a wide-ranging restructure, and that social workers’ case load will be halved.<sup>7</sup> This will undoubtedly bring many improvements in social care in Liverpool generally, and in the lives of kinship families also.

We encourage kinship care advocates, and indeed advocates for the interests of other marginalised groups, to use our experiences to take a human rights-based approach in their work.

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Please note that the views expressed in this document are those of Dr Aoife Daly.

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<sup>7</sup> <https://liverpoolexpress.co.uk/unprecedented-investment-in-childrens-social-care-in-liverpool/>





